U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 30 December 2003

CASE NO: 2004-SOX-8

In the Matter of:

WAYDE S. LERBS,
Complainant,

v.

BUCA DI BEPPO, INC.,
Respondent.

ORDER DENYING MOTION TO DISMISS

This proceeding arises under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act, ("Sarbanes-Oxley" or "the Act"). On December 16, 2003, Buca di Beppo, Inc. ("Respondent") filed a motion to dismiss with prejudice the complaint filed by Wayde S. Lerbes ("Complainant") in this proceeding. Respondent asserts that Complainant failed to properly serve on it copies of the objections filed with the Office of Administrative Law Judges ("OALJ") which initiated this proceeding. Respondent further asserts that Complainant's failure to comply with the regulations requiring such service requires dismissal of his complaint. Respondent's motion will be denied for the reasons stated below.

Procedural History

This matter was referred for hearing to OALJ by the Occupational Safety & Health Administration ("OSHA") on October 16, 2003. Attached to the referral letter were copies of Complainant's original complaint, the Secretary's findings with respect to that complaint, and the first page of the final OSHA investigation report regarding the complaint. The letter notifying Complainant of the Secretary's findings, also dated October 16, 2003, informed the parties, *inter alia*, that:

> Complainant and Respondent have 30 days from receipt of these Findings to file objections and request a hearing on the record, or they will become final and not subject to court review. Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, 800 K Street NW Suite 400, Washington, D.C. 20001, with this office, and with the Regional Administrator, U.S. Department of Labor – OSHA, 230 S. Dearborn St. 32nd Floor, Chicago, IL 60604.

Letter of Timothy L. Kobernat, Area Director, Occupational Safety & Health Administration

dated October 16, 2003 at 2-3.

Complainant's letter objecting to the Secretary's findings was received and docketed by OALJ on November 21, 2003. The letter was dated November 13, 2003 and, pursuant to Area Director Kobernat's instructions, was sent to the Chief Administrative Law Judge of OALJ, the Regional Administrator of OSHA in Chicago, Illinois, and the OSHA Office in Eau Claire, Wisconsin.

On November 27, 2003, a member of my staff contacted the parties in this case to discuss scheduling a formal hearing. The parties agreed that the hearing should be set in Minneapolis, Minnesota and that a hearing should be scheduled sometime in March or April 2004. Respondent also noted at that time that it had not previously received a copy of Complainant's November 13, 2003 objections and request for hearing.

On December 1, 2003, a copy of Complainant's November 13, 2003 letter was sent to Respondent via facsimile by a member of my staff.

On December 3, 2003, I issued a notice of docketing and order temporarily staying these proceedings. The parties were instructed to notify me in writing within fifteen days of the order of their availability for specific hearing dates, the anticipated length of the hearing, and the amount of time needed to conduct discovery.

On December 16, 2003, Respondent filed a motion to dismiss this case based on Complainant's failure to serve on it a copy of the objections and request for formal hearing filed with OALJ.

Discussion

Respondent is seeking dismissal of the complaint filed by Lerbs based on his failure to serve a copy of his objections on Respondent within 30 days from receipt of OSHA's determination. However, Respondent cites no authority other than § 1980.106(a) in support of its motion, and it has neither claimed nor shown that it was prejudiced by the delay in its receipt of those objections. The issue it raises, *i.e.*, whether the thirty-day filing provision of this regulation is a jurisdictional requirement which cannot be modified or a non-jurisdictional procedural limitations period subject to equitable tolling, appears to be one of first impression. For the reasons stated below, I find that the regulation does not establish a jurisdictional requirement, that it is therefore, subject to equitable tolling, and that Respondent's motion should be denied.

The regulations applicable to complaints alleging discrimination under Sarbanes-Oxley provide, in pertinent part:

> (2) If the Assistant Secretary concludes that a violation has not occurred, the Assistant Secretary will notify the parties of that finding.
>
> (b) The findings and the preliminary order will be sent by certified mail, return receipt requested, to all parties of record. The letter accompanying the

> findings and order will inform the parties of their right to file objections and to request a hearing, and of the right of the named person to request attorney's fees from the ALJ, regardless of whether the named person has filed objections, if the named person alleges that the complaint was frivolous or brought in bad faith. The letter also will give the address of the Chief Administrative Law Judge. At the same time, the Assistant Secretary will file with the Chief Administrative Law Judge, U.S. Department of Labor, a copy of the original complaint and a copy of the findings and order.

29 C.F.R. § 1980.105(a)(2), (b) (2003). The regulations further state:

> (a) Any party who desires review, including judicial review, of the findings and preliminary order, . . . must file any objections and a request for a hearing on the record within 30 days of receipt of the findings and preliminary order pursuant to Sec. 1980.105(b). The objection . . . and request for a hearing must be in writing and state whether the objection is to the findings, the preliminary order, and/or whether there should be an award of attorneys' fees. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the objection is filed in person, by hand-delivery or other means, the objection is filed upon receipt. Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, DC 20001, and copies of the objections must be mailed at the same time to the other parties of record, the OSHA official who issued the findings and order, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

29 C.F.R. § 1980.106(a) (2003).

Respondent alleges that "[t]he requirement of notice within thirty days after receipt of the decision is important to avoid prejudice to the respondent." Respondent's Memorandum Supporting Motion to Dismiss ("Resp. Mem.") at 2. Respondent further argues:

> If the procedure is not followed, the respondent cannot be sure whether a matter is closed and may be left hanging indefinitely. Additionally, service on the respondent ensures that the respondent has a fair opportunity to respond and protects against ex parte communications. Lerbs failed to follow the procedure, and his request for a hearing should therefore be denied.

Ibid. As noted above, Respondent does not suggest that it has, in fact, been prejudiced as a result of not receiving Complainant's objections to OSHA's determination. Nor does it argue that there have been any impermissible *ex parte* communications between Complainant and the undersigned administrative law judge.

1. Jurisdiction.

As the Secretary of Labor has previously recognized, "[i]ndicia that a limitations period may be modified include the character of the provisional language and the statute's remedial purpose." *Spearman v. Roadway Express, Inc.*, 1992-STA-1 (Sec'y, August 5, 1992) (citing *Mondy v. Sec'y of the Army*, 845 F.2d 1051, 1055-56 (D.C. Cir. 1988)), *aff'd*, 1992-STA-1 (Sec'y June 30, 1993). The purpose of Sarbanes-Oxley's whistleblower provision is clearly remedial, and the weight of the relevant authority holds that analogous time limits under other whistleblower and employee protection statutes are non-jurisdictional.[1] For example, the Supreme Court has held that similar filing deadlines under Title VII of the Civil Rights Act of 1964 and the Social Security Act are subject to equitable tolling. *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 111 S. Ct. 453 (1990); *Bowen v. City of New York*, 476 U.S. 467 (1986).[2] More importantly, the Administrative Review Board ("ARB") has made this same finding with respect to the regulation[3] which establishes a filing deadline for hearing requests under the whistleblower provisions of the Energy Reorganization Act ("ERA") and the Clean Air Act. *Howlett v. N.E. Utilities,* 1999-ERA-1 (Dec. 28, 1998) (recognizing that the principles of equitable tolling were properly applied by the ALJ), *aff'd*, ARB No. 99-044 (ARB March 13, 2001); *Shelton v. Oak Ridge Nat'l Labs.*, ARB No. 98-100, ALJ No. 1995-CAA-19 (ARB March 30, 2001) (stating that "[b]oth the Secretary and this Board have held that the time limit for filing a request for a hearing is not a jurisdictional prerequisite"); *see also Stoner v. Gen. Physics Corp.*, 1998-ERA-44, 4-9 (ALJ Sept. 4, 1998) (stating that this finding is consistent with the ERA and APA, and does not deprive the respondents of either due process or any statutory right).[4] This same interpretation has also been given to analogous requirements under whistleblower provisions of the Surface Transportation Assistance Act ("STAA") and the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"). *In re Tavares v. Swift Transp. Co., Inc.,* ARB No. 01-036, ALJ No. 2001-STA-15 (ARB Oct. 2, 2001) (concurring in the ALJ's finding that the time limit for requesting a hearing under the STAA could be equitably tolled for a variety of reasons including inadequate notice); *Swint v. Net Jets Aviation, Inc.*, 2003-AIR-26 (ALJ July 9, 2003). The recent holding in *Swint* pertaining to AIR

[1] The preamble to the interim final rule, 29 C.F.R. 1980, states that "[i]n drafting these regulations, consideration has been given to the regulations implementing the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st century ("AIR 21"), codified at 29 C.F.R. 1979, the Surface Transportation Assistance Act ("STAA"), codified at 29 C.F.R. 1978, and the Energy Reorganization Act ("ERA"), codified at 29 C.F.R. 24, where deemed appropriate." 68 Fed. Reg. 31860 (May 28, 2003) (codified at 29 C.F.R. pt. 1980). This language further highlights the similarities between these statutes.

[2] In addition, several courts have applied equitable tolling to the time limits for filing an initial complaint under different employee protection statutes. *See, e.g.*, *City of Allentown v. Marshall*, 657 F.2d 16 (3rd Cir. 1981) (deciding this issue with regard to the whistleblower claims under the Toxic Substances Control Act); *Donovan v. Hakner, Foreman & Harness, Inc*., 736 F.2d 1421 (10th Cir. 1984) (making the same determination under the Occupational Safety and Health Act). Similarly, the Supreme Court has held that the limitations provision in the Federal Employers' Liability Act is subject to tolling. *Burnett v. New York Cent. R..R.. Co*., 380 U.S. 424 (1965).

[3] 29 C.F.R. §24.4(d).

[4] *But see Webb v. Numanco, L.L.C.*, 1998-ERA-27, 28 (ALJ July 17, 1998), *vacated on other grounds* (ARB 98-149 Jan. 29, 1999); *Cruver v. Burns Int'l*, 2001-ERA-31 (RDO Dec. 5, 2001). However, in several recent decisions, ALJs explicitly rejected the reasoning and conclusions found in these two decisions. *Lazur v. U.S. Steel-Gary Works*, 1999-ERA-3, 12-13 (ALJ May 18, 2000); *Stoner v. Gen. Physics Corp.*, 1998-ERA-44, 8 (ALJ Sept. 4, 1998); *Hibler v. Exelon Nuclear Generating Co.*, L.L.C., 2003-ERA-9, 2 (ALJ May 5, 2003). In *Hibler*, the ALJ has certified the question whether the time limit requirement under the ERA is jurisdictional as a controlling question of law to allow an interlocutory appeal to the ARB. *Hibler*, 2003-ERA-9 (ALJ June 4, 2003).

21 is particularly persuasive since, before regulations implementing Sarbanes-Oxley were enacted, AIR 21's procedural provisions were applied in whistleblower actions brought under the Act. 18 U.S.C. § 1514A(b)(2) (2003); 49 U.S.C. § 42121(b) (2)(A)(2002). As Judge Morgan so aptly noted in *Swint*, "case law on the issue of whether filing periods are a jurisdictional bar in employee protection provisions clarifies that filing periods are not a jurisdictional bar, which would deny . . . [an ALJ] subject matter jurisdiction to hear this claim and are analogous to a Statute of Limitations." *Swint*, 2003-AIR-26 at 7 (citing *Donovan v. Hakner, Forman & Harness, Inc.*, 736 F.2d 1421 (10th Cir. 1984)).

2. Application of the Principle of Equitable Tolling.

Based on my determination that § 1980.106(a) does not impose a jurisdictional limitations period, the question then becomes whether equitable tolling applies in this case. I note preliminarily that statutory filing periods are to be strictly construed and "[r]estrictions on equitable tolling must be scrupulously observed." *Swint*, 2003-AIR-26 at 8 (citing *Marshall*, 657 F.2d at 20). I also recognize that "[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Baldwin County Welcome Ctr. v. Brown*, 4 U.S. 147, 151 (1984), and equitable tolling may not be appropriate where an employee was represented by counsel during the limitations period. *Howlett*, 1999-ERA-1 at 4 (citing *Keyse v. California Texas Oil Corp*., 590 F.2d 45 (2nd Cir. 1978)). However, I further recognize that courts have applied equitable tolling in a variety of circumstances including: where a complainant received inadequate notice;[5] where he was prevented from asserting his rights in some extraordinary way;[6] or where he actively pursued his judicial remedies but filed a defective pleading.[7]

In the present case, Complainant diligently pursued his appeal of OSHA's denial of his complaint. According to the October 16, 2003 letter from Area Director Kobernat, Complainant was informed that he had 30 days from receipt of OSHA's findings to file objections "with the Chief [ALJ] . . . , with [OSHA] . . . , and with [OSHA's] Regional Administrator." The letter did not inform Complainant that he was required to simultaneously mail a copy of his objections to the "other parties of record," nor did it instruct him to serve a copy of his objections on "the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor" in Washington, D.C. 29 C.F.R. § 1980.106(a). On November 13, 2003, within 30 days from the date he received notice of OSHA's determination, Complainant mailed his objections and request for a hearing to the parties specified in Area Director Kobernat's letter. Claimant is not represented by counsel and should be excused for simply doing what he was told to do.

Under circumstances similar to these, the Secretary has allowed equitable tolling where the complainant promptly filed a request for review with the appropriate agencies but failed to serve it on his employer due to a confusing and misleading notice received from OSHA. *Spearman*, 1992-STA-1 at 4-5. The court stated:

> That Spearman may have neglected to serve [Respondent] with his initial request does not evince lack of diligence. The letter transmitting the Assistant Secretary's

[5] *Spearman*, 1992-STA-1 at 3, *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984).
[6] *Howlett v. N.E. Utilities*, 1999-ERA-1, 4 (ALJ Dec. 28, 1998) (citing *Marshall*, 657 F.2d at 19-20).
[7] *Irwin*, 498 U.S. 89, 111 S. Ct. at 458; *Spearman*, 1992-STA-1 at 4.

> findings notified Spearman that he must file with the Regional Administrator and OALJ, which he did. It also advised him of a "responsibility for notifying the other appropriate parties" including his "former" employer, which did not pertain since Spearman remained in Roadway's employ. The letter did not specify a particular time for or manner of notification, *e.g.*, that service by mail concurrent with filing should be effected . . . . As a result, Spearman did not receive notice of the complete service requirement.

Id. at 5; *see also Gates v. Georgia-Pacific Corp.*, 492 F.2d 292 (9th Cir. 1974) (holding that equitable principles may toll 30-day requirement of Civil Rights Act, where agency's letter informed plaintiff that the agency was closing her case for lack of jurisdiction but did not advise her that she could commence action in district court within 30 days). Similarly, in another recent decision, the presiding administrative law judge suggested that equitable tolling may apply where a notice instructing complainant on the proper procedure for filing objections is not "timely, complete and adequate." *Swint*, 2003-AIR-26 at 8.

When deciding whether equitable tolling is appropriate, courts have also considered whether an opposing party would be prejudiced if tolling were allowed. *Shelton*, 1995-CAA-19 at 5. In making this determination, the primary inquiry is whether any delay resulting from an untimely complaint hampers the opposing party in litigating its case on the merits. *Id.* (citing *United States v. $57,960.00*, 58 F. Supp.2d 660 (D.S.C. 1999)). In the present case, notice to Respondent was delayed by only a few days: on November 27, 2003, my law clerk informed Respondent by telephone that Complainant had filed objections and a request for hearing, and a copy of Complainant's November 13, 2003 letter was thereafter forwarded to Respondent via facsimile on December 1, 2003. Since there is no evidence that the delayed notice has hampered in any way Respondent's ability to develop evidence or otherwise proceed with this litigation, application of the doctrine of equitable tolling is appropriate. Therefore,

IT IS HEREBY ORDERED that Respondent's motion to dismiss is DENIED.

A

STEPHEN L. PURCELL
Administrative Law Judge

Washington, D.C.